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No. 02-0819

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether the 60-day period for objecting to a bankruptcy discharge contained in Bankruptcy Rule 4004(a) is a non-jurisdictional filing deadline subject to equitable defenses, including waiver.

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STATEMENT OF THE CASE

A. Facts Upon Which Bankruptcy Debtor's Discharge Denied

Respondent, Robert A. Ryan, M.D. ("Ryan"), and Petitioner, Andrew Kontrick, M.D. ("Kontrick"), both cosmetic and plastic surgeons, were equal shareholders in a professional corporation founded by Ryan. App. at 2. Soon after becoming a 50% shareholder, Kontrick breached the three agreements that set out the terms of their professional relationship and his fiduciary duty to Ryan. App. at 42. Two arbitration proceedings ensued between the doctors, the first of which resulted in an award to Ryan of $47,157.81 plus interest, expenses and attorneys' fees. App. at 2. Kontrick paid a total of $65,261.32 in satisfaction of this judgment. *Id.*

The second arbitration resulted in an award to Ryan of $519,324.42 including punitive damages, costs, expenses and attorneys' fees. *Id.* The Illinois Appellate Court later reversed the punitive damages award of $150,000, reduced the prejudgment interest rate to 9%, and affirmed the remainder of the award in the amount of $369,324.42 plus interest. *Ryan v. Kontrick*, 304 Ill. App. 3d 852, 710 N.E.2d 11 (1st Dist. 1999). Kontrick has never satisfied the judgment entered based on the second arbitration award.

Following the first arbitration, Ryan filed a citation to discover Kontrick's assets. App. at 2. During his deposition, Kontrick repeatedly admitted that he transferred assets to his wife to protect them from his creditors, specifically Ryan. App. at 52. For example, when Kontrick was asked about his personal finances, including the decision to remove his name from the family checking

account, he stated that the change was "prompted" by "the ridiculous maneuvers that you and your client [Ryan] have put me through in order to collect money which you don't have coming to you." App. at 34. He further explained that he changed his finances because "[y]ou can spend your whole life working and then have some client who – some person out there who feels that he is entitled to your money because of some perceived wrong that they claim you have done, and they are then in a position to basically rob you of your life savings." *Id.*

Elaborating on these admissions, Kontrick stated that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So, I felt that this was a way of protecting myself." *Id.* Kontrick further admitted the following: "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything. In general, I have made an effort to not have any assets in my name." App. at 35.

In April 1997, Kontrick filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code ("Bankruptcy Code"). App. at 3.

B. The Bankruptcy Court Found That Bankruptcy Rule 4004 Is A Filing Deadline Subject To Equitable Defenses

Ryan timely filed an adversary complaint with the bankruptcy court objecting to Kontrick's request for discharge, and he subsequently sought and obtained leave to file an amended complaint. App. at 3-4, 40. As was the case with the original adversary complaint, the amended

pleading sought to deny a bankruptcy discharge to Kontrick pursuant to 11 U.S.C. § 727(a)(2), (3), (4), and (5), as well as a determination that Kontrick's debt to Ryan was nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). *Id.*

The amended complaint's objection to discharge under § 727(a)(2)(A) asserted for the first time that Kontrick's practice of depositing his paychecks in the year before his bankruptcy in an account that had previously been a joint family account, but now was only in his wife's name, had been done with the intent to hinder, delay or defraud his creditors. App. at 27. Kontrick answered the amended complaint, failing to raise any objection in his pleading to the timeliness of this new factual basis for objecting to discharge under § 727(a)(2)(A). App. at 16, 40.

Ryan moved for summary judgment on all counts of his amended adversary complaint. App. at 4. The bankruptcy court granted Ryan's motion for summary judgment on the family account claim, finding that Kontrick's actions in depositing his paycheck in his wife's account in the year preceding his bankruptcy had been done with the intent to defraud, hinder or delay his creditors within the meaning of § 727(a)(2)(A). App. at 4-5. The bankruptcy court further found that Kontrick particularly intended to hinder, defraud or delay Ryan from collecting on the second judgment. App. at 54.

Kontrick filed a motion for reconsideration, asserting for the first time the affirmative defense that the family account claim upon which summary judgment had been granted should instead have been rejected because it was not timely filed pursuant to Rule 4004(a). App. at 5. The bankruptcy court denied the motion to reconsider, holding

that Kontrick had waived the Rule 4004(a) timeliness defense. *Id.*

C. The District Court Found That Bankruptcy Rule 4004 Is A Filing Deadline Subject To Equitable Defenses

On appeal to the District Court, Kontrick raised two arguments. App. at 27. First, he argued that Ryan's non-dischargeability claim based on Kontrick's deposits into his wife's checking account in the year preceding his bankruptcy was untimely because the amended complaint was filed after the time for objecting to discharge had expired under Rule 4004(a). App. at 27-28. Second, he argued that the deposits into his wife's account neither reduced the assets available to creditors nor was intended to hinder, delay or defraud his creditors. *Id.* The District Court rejected both arguments. App. at 6.

The District Court determined that, lacking a Seventh Circuit decision on point, it would follow the recent decisions of several other Circuit Courts recognizing that Rule 4004(a) is merely a filing deadline that may be waived if an objection is not made in a timely manner. App. at 32-33. Based on these decisions, the District Court found that Kontrick had waived the issue of the timeliness of the family account claim by failing to raise it in his responsive pleadings. App. at 33. The District Court also agreed with the bankruptcy court that Kontrick's deposition testimony conclusively established that he intended to defraud, hinder or delay Ryan in collecting the judgment, and thus affirmed the bankruptcy court's grant of summary judgment. App. at 37-38.

D. The Seventh Circuit Found That Bankruptcy Rule 4004 Is A Filing Deadline Subject To Equitable Defenses

The Seventh Circuit likewise rejected Kontrick's argument that Rule 4004(a) is not subject to equitable defenses. App. at 14. Based on its consideration of the policy concerns that animate Rule 4004(a), the Seventh Circuit found that the rule is a filing deadline subject to equitable defenses, rather than a jurisdictional limitation. App. at 10, 12. The Seventh Circuit also concluded that Kontrick waived his argument as to the timeliness of Ryan's amended complaint and that the bankruptcy court had properly granted summary judgment to Ryan and denied Kontrick's discharge under § 727(a)(2)(A). App. at 23.

REASONS FOR DENYING THE PETITION

A. No Split Of Authority Exists In The Circuit Courts Of Appeals Concerning Bankruptcy Rule 4004(a)

Contrary to Kontrick's claim, there is no split of authority among the Circuit Courts of Appeals on Rule 4004(a). In fact, the Circuit Courts that have considered the nature of the filing deadline in Rule 4004(a) have recognized that it is not jurisdictional. *Ryan v. Kontrick*, 295 F.3d 724 (7th Cir. 2002) (holding that Rule 4004 is not jurisdictional); *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244 (4th Cir. 1994) (holding that Rule 4004 is not jurisdictional); *see also In re Moss*, 289 F.3d 540 (8th Cir. 2002) (recognizing that the courts have the equitable power to allow untimely objections to discharge under Rule 4004 if caused by the court's own error); *In re Themy*,

6 F.3d 688 (10th Cir. 1993) (recognizing that the courts have the equitable power to allow late-filed complaints objecting to discharge under Rules 4004 and 4007 when a court's action misleads a creditor as to the deadline); *In re Anwiler*, 958 F.2d 925 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992) (holding that courts have the equitable power to allow untimely objections to discharge under Rules 4004 and 4007 if caused by the court's own error).[1]

Kontrick mistakenly references a "split" in authority by comparing cases that address Rule 4004 with those that address Bankruptcy Rule 4007, as if they were the same rule. However, as the District Court stated, "discharge and dischargeability are governed by distinct procedural rules. Rule 4004 sets out the procedure for granting or denying discharge under § 727. Rule 4007 governs the determination of dischargeability of a debt under § 523." App. at 30.

Only Rule 4004 is at issue in this case. The Seventh Circuit, while analogizing Rule 4004 to Rule 4007, did not need to determine whether or not Rule 4007 was subject to equitable defenses in deciding the case before it. If this Court were to believe that any split of authority concerning Rule 4007 needs to be resolved, another case that

[1] Kontrick's petition mistakenly suggests that the Eleventh Circuit held in *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994), that the deadline in Rule 4004(a) is a "jurisdictional requirement." In fact, the Court in *Coggin* merely held that because the discharge complaint had been timely filed, the bankruptcy court retained the equitable power to modify its own interlocutory orders. Thus, the references in the opinion to a "jurisdictional bar" that would exist if the complaint had not been timely filed are *dicta*. No Circuit Court has held that the time limitation contained in Rule 4004(a) is jurisdictional.

actually involves Rule 4007 would seem to be a more appropriate vehicle for doing so. Because this case involves Rule 4004(a), about which there is no split of authority among the Circuit Courts, rather than Rule 4007(c), Ryan respectfully contends the petition for certiorari be denied.

B. A Majority Of The Circuit Courts Of Appeals Have Found Bankruptcy Rule 4007(c), Which Does Not Even Apply To This Case, Is A Filing Deadline Subject To Equitable Defenses

Even if this Court were to consider Rules 4004(a) and 4007(c) to be so analogous that a case decided under one rule should determine the nature of both, a majority of the Circuit Courts have recognized that Rule 4007(c) is not jurisdictional. Specifically, the Second, Sixth, Ninth and Tenth Circuits have recognized that the time limitation in Rule 4007(c) is not jurisdictional. *In re Benedict*, 90 F.3d 50 (2d Cir. 1996) (holding that Rule 4007 is not jurisdictional); *In re Isaacman*, 26 F.3d 629 (6th Cir. 1994) (recognizing that the courts have the equitable power to allow untimely objections to discharge under Rule 4007); *In re Kennerley*, 995 F.2d 145 (9th Cir. 1993) (holding that the courts have the equitable power to allow late-filed complaints objecting to discharge under Rule 4007 when the court misleads a party as to the deadline); *In re Anwiler*, 958 F.2d 925 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992) (concluding that the courts have equitable power to allow late-filed complaints objecting to discharge under Rules 4004 and 4007 when a court's act misleads a creditor as to the deadline); *In re Themy*, 6 F.3d 688 (10th Cir. 1993) (same).

Only the Fifth and Eleventh Circuits, in earlier decisions, have found that Rule 4007 is jurisdictional and,

hence, not subject to waiver or other equitable defenses. *Neely v. Murchisen*, 815 F.2d 345 (5th Cir. 1987) (holding that Rule 4007 sets a fixed limitation period of sixty days); *In re Alton*, 837 F.2d 457 (11th Cir. 1988) (finding that Rule 4007 is mandatory and does not allow court any discretion to grant a late-filed motion for extension of time to file complaints objecting to discharge). These conflicting decisions by the Fifth and Eleventh Circuits were rendered fifteen or more years ago. Since that time, no Circuit Court has ruled that Rule 4007(c) is jurisdictional. As a result, these two aberrational decisions have effectively been rendered historical footnotes in light of the uniform reasoning and trend of the decisions in more recent years.

In light of these more recent decisions recognizing that Rule 4007(c) is not jurisdictional, it is reasonable to expect that the Fifth and Eleventh Circuits would reconsider or modify their earlier decisions concerning this rule. Evidence of such reconsideration can be seen in the Tenth Circuit, which held in *First Nat'l Bank v. Barnes*, 956 F.2d 277, unpublished disposition, 1992 WL 33251 (10th Cir. 1992), that Rule 4007(c) was jurisdictional, but then in a published decision decided the following year, *In re Themy*, 6 F.3d 688 (10th Cir. 1993), found that a court has the equitable power to allow a party to file a complaint after the filing deadline imposed by Rules 4004 or 4007 has run. Thus, it appears that the Tenth Circuit has modified its view on the jurisdictional nature of Rule 4007(c) and concluded that 4004(a) and 4007(c) are subject to equitable considerations and defenses – something that could not be the case if these statutory limitations were jurisdictional. *See, e.g., In re Benedict*, 90 F.3d at 54 (holding that equitable considerations cannot excuse a jurisdictional defect).

Kontrick attempts to use disagreements at the bankruptcy and district court levels regarding Rules 4004 and 4007 to bolster this supposed conflict between the Circuit Courts on Rule 4004. Disagreements at the bankruptcy and district court level are not a compelling reason for Supreme Court review. *Braxton v. United States*, 500 U.S. 344, 347 (1991) (principal purpose for certiorari jurisdiction is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law); *see generally* S. Ct. Rule 10. Indeed, such conflict is best handled by the Circuit Courts.

The Circuit Courts are clearly moving toward agreement on Rule 4007(c). Further percolation in the lower courts will likely lead to consensus on this issue. In fact, it is quite a stretch to argue that a conflict among the Circuit Courts exists concerning whether equitable defenses apply to a filing deadline in Rule 4004 where there is no conflict at all with respect to that rule, and there has been no conflict among the Circuit Courts that have ruled on this issue with respect to Rule 4007 during the last 15 years. As a result, the time does not seem ripe for review by this Court and Ryan respectfully requests that the petition for certiorari be denied.

C. The Seventh Circuit's Reasoning In The Decision Below That The Time Limit Provided In Rule 4004(a) Is A Filing Deadline Subject To Equitable Defenses Is Correct

The Seventh Circuit's reasoning that Rule 4004(a) is a filing deadline subject to equitable defenses is sound. It is in complete accord with the other Circuit Courts that have ruled on this issue, correctly reflecting the view that a rigid jurisdictional interpretation of Rule 4004(a) would be

both unjust and contrary to the policy considerations that underlie the Bankruptcy Code.

The Seventh Circuit properly started its analysis by recognizing the principle that "[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985). App. at 7. The issue then became for the Seventh Circuit whether some basis existed for treating Rule 4004(a) as an exception to this general rule. *Id.*

The text of Rule 4004 fails to suggest that its time limitation is intended to be jurisdictional. App. at 8-9. Nor does the text of Bankruptcy Rule 9006(b)(3),[2] the rule that governs the enlargement of time for filing complaints under Rule 4004(a), suggest that the filing deadline is jurisdictional. *Id.* Although Rule 9006(b)(3) restricts the grounds upon which the bankruptcy court may enlarge time for actions under Rule 4004(a), it also grants the bankruptcy court discretion to allow extensions – discretion that is, by definition, anathema to rules that are jurisdictional in nature. App. at 9-11. The Seventh Circuit then examined the structure, legislative history and underlying policies of the bankruptcy rules. App. at 9.

The Circuit Court determined that the overall structure of the bankruptcy statute provides support for the view that Rule 4004 is not jurisdictional. App. at 12. For

[2] Bankruptcy Rule 9006(b)(3) provides: "The court may enlarge time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules."

example, no indication exists that timeliness is a prerequisite to a bankruptcy court's exercise of jurisdiction in a core proceeding such as Ryan's objection to discharge. App. at 13.

Next, the Seventh Circuit weighed the competing policies underlying the Bankruptcy Code. App. at 9-12. While the Court acknowledged the importance of ensuring that debtors are not harassed by creditors after their claims have been discharged in bankruptcy, it found that finality would in fact be at greater risk if the time limitation contained in Rule 4004(a) were jurisdictional. App. at 11-12. If it were jurisdictional, then even a final judgment would be subject to collateral attack, a result that would not serve the Bankruptcy Code's goal of promoting certainty and finality for debtors. *Id.* The Seventh Circuit determined that these goals would be better fostered not by a rigid jurisdictional approach to Rule 4004(a), but by allowing the bankruptcy courts to exercise their discretion. *Id.* Based on these considerations, the Seventh Circuit concluded that the timeliness provision in Rule 4004(a) is not jurisdictional. App. at 14.

The Seventh Circuit correctly decided that Rule 4004(a) is more akin to a filing deadline subject to equitable defenses than a jurisdictional deadline. For this reason, Ryan respectfully requests that the petition for certiorari be denied.

CONCLUSION

In sum, no split of authority exists among the Circuit Courts of Appeals on Rule 4004. As a result, this case is not the proper vehicle to resolve any conflict concerning

whether Rule 4007 is or is not jurisdictional. Even if Rule 4007 were in dispute, all of the most recent cases decided by the Circuit Courts are in agreement that it is a filing deadline subject to equitable defenses and considerations. Furthermore, the Seventh Circuit correctly decided that Rule 4004(a) is subject to waiver and other equitable defenses. For these reasons, Ryan respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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